Supreme Court, U.S.
FILED
MAY 29 2002
OFFICE OF THE CLERK

No. 01-1595

IN THE

Supreme Court of the United States

TAMMY McGOVERN,

Petitioner,

v.

MONTIE and ANN McGOVERN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

The Petitioner cites this Court's Rule 11(c) (intending to cite Rule 10(c)) for the Court's jurisdiction. Neither rule, however, establishes jurisdiction in this matter, and jurisdiction lies, if at all, under 12 U.S.C. § 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Jurisdiction does lie under § 1257 with respect to the Petitioner's Question Number 1; the Petitioner sought review of the complained-of decision by bringing an unsuccessful Petition for Review of that decision before the Arizona Supreme Court. The Petitioner, however, never sought state supreme court review of the Court of Appeals' denial of the Petitioner's application to stay mandate (Question Number 2). As such, this Court is without jurisdiction to consider that Question.

MATERIAL FACTS

This matter concerns a child, Chloe McGovern, daughter of Petitioner Tammy McGovern and the sole grandchild of Respondents Montie and Ann McGovern (Tammy's parents).

In mid-1994 Tammy moved herself and two-week old Chloe from California into the McGoverns' Tubac Arizona

home. Tammy and Chloe thereafter resided with the McGoverns as family for the next four and one-half years, until the Petitioner abruptly moved herself and Chloe to Tucson in January of 1999.

Up until the move to Tucson, Montie and Ann's caring for and interactions with Chloe were part and parcel of daily existence for all. *Inter alia*, Ann provided daily care for Chloe while Tammy worked (first part-time and later full-time) and attended college, and the McGoverns were found by the trial court to have provided "substantial and significant financial, physical and emotional support" for both Tammy and Chloe. The Respondents were far more than the usual sort of grandparents to Chloe, and they and their granddaughter were extremely fond of each other and were very highly bonded to one another.

For several weeks following the Petitioner's move to Tucson the Petitioner allowed visitation between Chloe and the Respondents. At that point, however, the Petitioner cut off visitation. Despite Respondents' pleas, visitation was not resumed and the Respondents subsequently filed their petition in Superior Court for court-ordered visitation. Only in May of 1999 (four months into the Petitioner's denial of visitation) did the Petitioner agree to allow visitation to resume. At that time, on the very cusp of hearing on the issue of *pendente lite* visitation, a stipulated *pendente lite* order for visitation was entered, which remained in effect through the March 2000 trial on the merits and the trial court's April 2000 decision.

In its April order the trial court found that visitation between the Respondents and Chloe had been shown to be "clearly in the best interest of the child", and the court

established a modest visitation schedule between Chloe and her grandparents. As the Petitioner admits, however, no visitation took place subsequent to the entry of the trial court's April 2000 order.[1]

The Petitioner did not comply with the visitation schedule as established in the April order. Nor has she otherwise allowed visitation between Chloe and her grandparents on an informal basis, after that order was stayed[2] and then subsequently vacated by the trial court on the Petitioner's motion for reconsideration. It is now over two years since Tammy McGovern has permitted visitation or contact between Chloe and her grandparents.

In August 2000 the trial court granted the Petitioner's motion to reconsider the April 2000 ruling, holding that it had failed to conduct the trial and consider the evidence in accord with the requirements of *Troxel v. Granville* — which had been decided in the interim. The Respondents appealed. On appeal, the Court of Appeals found itself compelled to defer to the trial court's hindsight on those matters, but found insufficient support in the record to explain or sustain the trial court's ruling that visitation be left "in the discretion of

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1. *See* Petition for Writ of Certiorari ("Petition"), at 5. In this vein, the Petitioner states (*id.*) that while she attempted to arrange visitation following the April 2000 order, the "grandparents never agreed to visitation timings that were remotely consistent with [the Petitioner's] difficult and very full life." The Respondents dispute the accuracy of this account.

2. In response to the Petitioner's request for emergency stay (based on *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)), the trial court stayed its April 10, 2000 order on June 21, 2000.

the mother." For this reason and because the Court determined that fairness required that the grandparents be given the opportunity to present their case under the then-known requirements of *Troxel*, the Court remanded the matter to the trial court for further proceedings to determine whether visitation was appropriate.

REASONS FOR DENYING THE WRIT

The Petitioner asserts that the remand's call for further proceedings creates such an unbearable burden upon her as to itself constitute a violation of due process.

While the Petitióner here cries constitutional foul, what the Petitioner in fact is seeking is simply delay, not the setting-right of any due process injury.

No such foul taints the decision at issue here, much less one which might merit the attention of this Court. Delay is the Petitioner's game and her goal is one of continuing for so long as possible the absence of contact and reasonable visitation between Chloe and the McGoverns. It has been over two years now since the child has seen her grandparents, who had for so long played such a positive, central and crucial role in her life. This drought did not come about by accident but arose by design, obviously. It could have been otherwise, clearly, for the trial court's August 2000 decision left visitation in the Petitioner's "discretion". "Discretion" and visitation, however, have both been unfulfilled here, along with the best interests of one particular little girl.

A. The Denial of Stay of Mandate Presents No Justiciable Question

The mandate in this matter issued as provided under Arizona rules and procedures as a matter of course. The mandate having issued, the trial court will set its evidentiary hearing for the case-on-remand; in accord with the instructions of the Court of Appeals, the trial court will consider the evidence and determine whether an order for visitation is proper here, and if it is, in what amount and under what terms.

The parties will make their respective cases/defenses, having now been apprised of the constitutional presumptions and protections required by *Troxel* and its progeny. In rendering its decision the trial court will apply those rules. The Respondents are confident that the evidence will persuasively show that notwithstanding the long and unfortunate hiatus in the contact between Chloe and her grandparents, an order for reasonable meaningful visitation will be again be found to be clearly in Chloe's best interest, and that such an order may properly issue, without violation of Tammy's constitutional rights.

This, of course, is precisely what is feared by the Petitioner, who views the continued delay and rupture in contact to be a circumstance which will ultimately redound to her benefit. If, after all, the mandate were stayed and non-contact were continued as the rule for a further 6 months or a year or two more, might that not tend to degrade the affection and bond that Chloe has with her grandparents?; and would that not tend to make it less likely that an order for visitation might subsequently be found to be clearly in Chloe's best interests?

While such reasoning by the Petitioner is consistent with her conduct, she has made no such confession here, and she attempts, rather, to create a constitutional question out of a mandate unstayed.

However, even assuming a constitutional question were potentially in play, the Petitioner's failure to bring the denial of the stay of mandate before the Arizona Supreme Court renders the question non-justiciable. 28 U.S.C. § 1257; *Gorman v. Washington University*, 316 U.S. 98, 62 S. Ct. 962 (1942). While the Petitioner suggests that there was no possibility of any effective review of the order by the Arizona Supreme Court, she offers no hint of any authority or evidence for this claim, a claim which is clearly false.

Indeed, in her application for stay in the Court of Appeals itself the Petitioner raised no argument that the stay was required on constitutional grounds, and she thereby waived any right to bring this supposed claim before this Court. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S. Ct. 2296 (1983).

There is, moreover, no *bona fide* constitutional question at issue in the first place. The Petitioner cites no authority on this question (her Question 2) at all. She cites not a single decision which is remotely supportive of the notion that an appellate court's denial to issue an admittedly discretionary stay of mandate has or might constitute a federal due process violation under any circumstances, much less under the circumstances of this case.

The Petitioner's naked supposition that stays are routinely granted in circumstances such as are presented here is wholly without foundation, and her suggestion that the

Court of Appeals' denial of the stay was grounded in improper motivations (Petition at 17) is, frankly, outrageous. The Court, rather, likely viewed the Petitioner's *pro forma* two-sentence application for stay as simply unpersuasive and ill-advised under the circumstances. Such a conclusion would be a natural and reasonable one in a case such as this, where the nature, intensity and duration of the bonds between child and grandparent were so pronounced; where an order for visitation might well again be found to be appropriate as being in the best interests of the child; where no such order had been in place for a year and a half; where the record showed the mother to have refused visitation in the absence of an order; and where there was no evidence that the mother had allowed visitation during the course of the lengthy appeal. In visitation matters, particularly, justice delayed is justice denied.

Finally, the Petitioner's second Question must be answered in the negative for the reason that it fails to fall within the parameters of this Court's Rule 10(c), and because it is predicated on the unsustainable premise that the Court of Appeals decision to remand the matter for retrial was constitutionally infirm.

B. The Remand Was Proper and Constitutionally Unobjectionable

In support of the claim of constitutional injury asserted in her Petition, Tammy McGovern relies upon the words of Justice Kennedy's dissent in *Troxel* that:

> It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations

> for the child's welfare becomes implicated. . . . If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. [530 U.S. at 101, 120 S. Ct. at 2079]

Justice Kennedy's concerns were expressly shared by the plurality in *Troxel*, and cited in connection with its decision not to remand.

Were the facts of the case *sub judice* on all fours with those present in *Troxel*, the propriety of remand here might well be questionable. That said, whether such action, would, under such circumstances, in fact amount to a constitutional violation is very much an open question; so far as counsel is aware, in no decision (the *Troxel* plurality included) has any court held that a reviewing court's remand was or would be constitutionally forbidden as the Petitioner claims is the case here.

Furthermore, notwithstanding the Petitioner's assertions to the contrary, the facts of this case differ from those of in *Troxel*, and those differences are many and substantial. For example, Justice Kennedy's words cited above were expressed in a case in which the question of grandparent visitation had then been the subject of litigation for well over six years, and which had included two passes through the Washington Court of Appeals, a further full-scale review by the Washington Supreme Court and another comprehensive review by this Court. The burdens of litigation here have been substantially less than in *Troxel*.[3]

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3. Similarly, although the Petition is liberally peppered with assertions that the Petitioner has been financially overwhelmed by the course and costs of litigation, and while Arizona law permits an (Cont'd)

Moreover, the relationships in *Troxel* and those here vary substantially. For example, the quality, quantity and duration of the pre-existing contact in *Troxel* did not remotely approach that which is found here; there was not presented in *Troxel* any suggestion of the sort of strong bond and attachment between the child and grandparents — the intensive, long, and caring relationship — which the evidence and the trial court's findings here undisputedly affirm.

A further feature which prominently distinguishes the cases concerns the question of visitation which the parent in *Troxel* afforded the grandparents, as compared to this case. In *Troxel*, there was no denial of visitation, but the parent's offer of visitation, rather, was rejected as insufficient by grandparents, who then sued to secure more visitation than had been offered. While there was no cut-off of visitation by the parent in *Troxel*, shortly following her move to Tucson in early 1999 the Petitioner responded to her parents' requests for somewhat greater visitation by cutting off visitation altogether for four months. The Petitioner agreed to a resumption of some degree of visitation between Chloe and her grandparents only at the court-house door. This evidence is undisputed in the record, and was noted by the Court of Appeals. *See* Opinion at, *e.g.*, ¶ 3 and footnote 5.[4]

(Cont'd)
award of fees in such actions where there is a financial disparity between the parties (A.R.S. § 25-324), the Petitioner made no showing of an entitlement to fees either to the trial court or to the Court of Appeals, both of which denied her claim for fees in their respective courts. (Nor did Tammy cross-appeal the trial court's denial of fees).

4. The Petitioner claims (Petition at 14) that the Court of Appeals was "confused" with respect to this question, and that the four-month long break was simply due to an extended childhood infection.
(Cont'd)

While the above-noted features do not exhaust the universe of relevant dissimilarities between the cases of *Troxel v. Granville* and *McGovern v. McGovern*[5], they do render it clear that the facts of the instant case are markedly distinct from those of *Troxel*. It is unsurprising, therefore, that while remand in *Troxel* was found to be inappropriate, the opposite is true here.

A fair review of the Court of Appeals' Opinion reveals the Court to have harbored concerns regarding the Petitioner's having cut off visitation for four months at beginning of 1999, and regarding the failure of the record to reflect with any specificity what amount of visitation (if any) the Petitioner was in fact purportedly willing to offer at the time of trial and the trial court's decisions. *See, e.g.*, Opinion, at footnote 5 and ¶¶ 22-25, 26. Under *Troxel*, a parent's ***bona fide*** willingness to allow "***meaningful***" visitation is a factor which should be given "significant weight" in a grandparent visitation determination (530 U.S. at 72), such that the

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(Cont'd)

This ahistorical "explanation" of the rupture in visitation is wholly unsupported by the record. Nor was the Court of Appeals confused on the question: the Respondents' (Appellants') Opening Brief brought this to the Court's attention (with record support), which the Petitioner was unable to dispute in her Responsive Brief (which failure was in turn pointed out in the McGoverns' Reply Brief).

5. Further material differences include, for example, the fact that the Arizona statute is considerably more limited than the "breathtakingly broad" Washington State statute which the *Troxel* plurality found to so troubling, and the fact that unlike the case here, the trial court in *Troxel* apparently approached its decision while entertaining a presumption in favor of grandparent visitation (*versus* the appropriate (rebuttable) presumption, which favors the wishes of the parent).

existence of such *bona fides* tends to militate in favor of determination which accords with the parent's wishes. Conversely, the lack of such *bona fides*, in circumstances where visitation can objectively be found to be in the child's best interests, is substantial evidence in rebuttal of the presumption that the question of visitation should remain in the sole "discretion" of the parent.

As the Court of Appeals noted, not only was the record unclear as to what evidence supported the trial court's determination to leave the question of visitation in the Petitioner's sole discretion, but it was appropriate, given the silent, cloudy and/or undeveloped record, to remand the matter so that the parties could fairly try the case (and so the trial court might fairly consider and decide the case) in light of the constitutional lessons and presumptions which had been handed down in *Troxel* subsequent to the trial in this matter. The Indiana Court of Appeals had similarly resolved the appeal before that court, in markedly like circumstances. *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. App. 2001).

The Petitioner faults the Court of Appeals for relying on *Crafton* in this regard. *Crafton*, so the Petitioner states, is materially distinguishable from the case at bench, for in *Crafton* visitation had been denied by the parent, while here no such denial of visitation had taken place. While the Petitioner points to two sentences in the trial court's August 2000 decision where the court does apparently contradict this denial of visitation, such statements were simply in error; as the Court of Appeals accurately noted (at footnote 5):

> The trial court in our case apparently found that the mother had not completely denied visitation to the grandparents at any time pertinent to its

> ruling. ***The record, however***, reflects that visitation neither occurred nor was offered for approximately four months between late January 1999 and the May *pendente lite* order. [Emphasis added.]

These and similar errors on the part of the trial judge here prompted the Court of Appeals to remand the matter to the trial court, since the Court was

> [U]nable to conclude as a matter of law that the grandparents did not carry their burden of rebutting the presumption of parental primacy or could not do so if given the opportunity.

(Opinion at ¶ 27.)

The Petition here does not place in doubt the reasonableness of this decision under the circumstances of the case, and it is not surprising that the Arizona Supreme Court found no reason to take review of the petition which the Petitioner brought before it.

The Petition makes no showing that the Court of Appeals' close study of the record and the law, and its careful resolution of the appeal, run afoul of constitutional due process protections on the grounds that a further fact-finding proceeding and determination is called for so that there be a fair determination on the question of whether or not Chloe's longstanding and especially close relationship with her grandparents should be protected and fostered. While it is logically possible that there exist remand decisions so unreasonable, egregious and ill-suited to the facts and to the parties' circumstances that they cry out for a determination by the United States Supreme Court that the consequent exposure to further litigation itself constitutes a denial of substantive due process under the Constitution, the decision of the Arizona Court of Appeals in *McGovern v. McGovern* does not fall among them.

Comment on two final (somewhat related) points may be appropriate before concluding this Brief in Opposition. First, the Petitioner's argument is predicated on the assumption that the *Troxel* plurality opinion is one which should be considered as a majority decision insofar as establishing constitutional precedent, and this Brief's responsive argument has assumed this as well. Counsel undersigned confesses that it is unclear to her that this is entirely accurate[6], and to the extent that it is not, then the Petitioner's arguments are all-the-more without merit.

Secondly, the Petitioner here casts herself in the mold of a beleaguered party whose role in this dispute and litigation is that of a party who is not truly an actor, but rather one who has been acted-against. This conception yields an inaccurate view on a number of accounts, not the least of which is that it obscures the active role which the Petitioner has taken in creating the unusually strong bonds and dependencies which exist between her daughter Chloe and her parents the McGoverns. Assuming, still, that the *Troxel* plurality constitutes binding precedent on the question of grandparent visitation as a general matter, this Court was not presented in *Troxel* with the sort of active involvement of the complaining party as is present here, and did not consider such in its decision.

Where, however, (as here) a parent invites *her* parents into the life which she has chosen for her daughter and herself, and makes them an important, daily and integral part of that life for an extended period of time; and where (as here) the child and the grandparents naturally come to have a deep,

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6. *See, e.g., Riley v. Taylor*, 237 F.3d 300, 329 (3d Cir. 2001); *Nevius v. Sumner*, 105 F.3d 453 n.6 (9th Cir. 12 1996); *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184, 189 (5th Cir. 1995).

enduring and long-lived bond; is it appropriate to say that the parent's constitutional rights would be impermissibly infringed by a court's seeking to ensure that such relationships continue? Does not such conduct, and the natural consequences of it, amount to a waiver of claim of constitutional foul with respect to an order of reasonable meaningful visitation between the child and her grandparents?

While a positive answer to this question is in no way necessary to justify the decision of the Court of Appeals here, the Respondents suggest that this hitherto-unconsidered question is appropriately answered in the affirmative, and that this aspect of the case constitutes yet a further reason for declining the Petitioner's invitation to this Court.

CONCLUSION

As this Court stated in *Palmore v. Sidoti*, 466 U.S. 429, 431, 104 S. Ct. 1879 (1984):

> The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court.

This observation again proves itself true with respect to the present Petition, and in light of the arguments set forth above, the Respondents respectfully request that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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